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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LEE MAXIMILLION HUNT, Petitioner.	2 CA-CR 2008-0307-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20061018, CR-20061842, CR-20062654
and CR-20070954 (Consolidated)

Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 In 2007, petitioner Lee Hunt pled guilty to four felony offenses under separate cause numbers. In CR-20062654, he pled guilty to aggravated assault with a deadly weapon or dangerous instrument. Hunt also pled guilty to possession of a dangerous drug in CR-20061018, theft of a means of transportation by control in CR-20061842, and second-degree burglary in CR-20070954.[1]

¶2 At the sentencing hearing, the state presented the testimony of a Pima County Sheriff's Department (PCSD) sergeant who had, at the request of the Tucson Police Department, attempted to stop the vehicle Hunt was driving. He testified that Hunt had fired a gun at him on three occasions as he pursued Hunt's vehicle. On the third occasion, Hunt had "angle[d]" and "come[] to a stop in the roadway," so that the driver's side of Hunt's vehicle faced the officer as Hunt fired. The sergeant described this maneuver as "an ambush." The sergeant also agreed there had been, on all three occasions, "a number of other motorists" near where Hunt had fired the shots. A PCSD detective testified that he had found, where the shootings had occurred, a total of ten spent shell casings that matched the caliber of weapon Hunt had used.

¶3 For the aggravated assault conviction, the trial court found as aggravating factors: (1) "the number of people endangered by [Hunt's] actions"; (2) "the number [of]

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[1]Hunt filed a notice of and petition for post-conviction relief under each cause number and included all four cause numbers in the caption of his petition for review filed in this court. Each petition, however, raised arguments relevant only to his conviction and sentence for aggravated assault in CR-20062654.

shots that [he] fired"; (3) "the fact that this took place over three separate incidents"; (4) "that in the last incident, [Hunt] did appear to set up [the pursuing sergeant]"; and (5) the three other contemporaneous felony convictions. The court sentenced Hunt to a partially aggravated, eighteen-year prison term for aggravated assault and to concurrent, presumptive prison terms for the other felonies.

¶4 Hunt filed an of-right petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing the trial court could not properly rely on the factors it had—other than the other three felony convictions—in aggravating his sentence and that his counsel had been ineffective in failing to object to the court's consideration of those factors. *See* Ariz. R. Crim. P. 32.1. The court summarily denied relief, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶5 Hunt argues the trial court could not rely on his having fired multiple shots at different points during the pursuit as an aggravating factor because the "use of [a] deadly weapon was an essential element of the offense" of aggravated assault with a deadly weapon. *See* A.R.S. § 13-1204(A)(2). Hunt is correct that a sentence may not be aggravated for the use of a deadly weapon during the commission of an offense if "this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of

punishment under section 13-604." A.R.S. § 13-702(C)(2).[2] The court explained in its order denying post-conviction relief, however, that it "did not find as an aggravating factor the use of a deadly weapon" but instead "found that the number of shots fired was an aggravating factor and that the shots were fired in three different locations."

¶6 Hunt nonetheless asserts that "fir[ing] ten rounds three times during the chase constitute[s] use of the weapon in the commission of the offense." But the firing of multiple shots at different locations was not essential to Hunt's conviction—any one of the ten shots he had fired at the pursuing officer would have constituted aggravated assault with a deadly weapon. *See* A.R.S. §§ 13-1203(A)(2); 13-1204(A)(2). Section 13-702(C)(24) permits a sentence to be aggravated for "[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime." And the state requested Hunt's sentence be aggravated on this basis. Hunt cites no authority, and we find none, suggesting a trial court may not consider the number of shots fired or the continuing nature of a defendant's conduct—factors clearly relevant to the nature and circumstances of the offense—as aggravating circumstances under § 13-702(C)(24).

¶7 For similar reasons, we reject Hunt's argument that the trial court improperly aggravated his sentence pursuant to § 13-702(C)(17), which identifies as an aggravating factor "[l]ying in wait for the victim or ambushing the victim during the commission of a

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[2]This statute has been renumbered as A.R.S. § 13-701 by 2008 Ariz. Sess. Laws, ch. 301, §§ 23, 24. In this decision, we will refer to the sentencing statutes as they were numbered at the time Hunt committed the offenses.

felony." Hunt argues that the lying-in-wait factor has three elements that are not present here—watching, waiting, and concealment. But the court did not rely on § 13-702(C)(17) in aggravating his sentence. Again, as it explained in its order denying relief, it relied instead on subsection (C)(24). We do not find, nor does Hunt assert, any reason to conclude this was improper.

¶8 Hunt also contends the trial court could not properly find as an aggravating factor that he had endangered other motorists. Hunt analogizes the court's finding to the statutory aggravating factor found in A.R.S. § 13-703(F)(3), which requires a trial court in a capital case to consider as an aggravating factor whether "the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense." For that aggravating factor to properly be found, Hunt reasons, the third party must be in "the zone of danger," and he asserts "there was no evidence introduced that the bystanders were in the zone of danger." *See State v. Wood*, 180 Ariz. 53, 69, 881 P.2d 1158, 1174 (1994) (discussing "zone of danger" requirement for § 13-703(F)(3)). But, in its order denying Hunt's petition, the court stated that, even absent this factor, it would have sentenced Hunt to the same prison term because the other factors were sufficient to warrant the aggravated sentence. *See State v. Hardwick*, 183 Ariz. 649, 656-57, 905 P.2d 1384, 1391-92 (App. 1995) ("When a trial court relies on both proper and improper factors in aggravating a sentence, this court will uphold its decision 'only where the record clearly shows the trial court would have reached the same result even without

consideration of the improper factors.'"), *quoting State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989); *see also State v. Alvarez*, 205 Ariz. 110, ¶ 19, 67 P.3d 706, 712 (App. 2003) (remand necessary if "unclear whether the judge would have imposed the same sentence[] absent the inappropriate factor"). Accordingly, because we find no error in the court's reliance on the other factors used in aggravating Hunt's sentence, we need not decide whether the court properly could rely on this factor.

¶9 Last, Hunt asserts his trial counsel was ineffective in failing to object at sentencing to the trial court's "use of improper aggravating factors." To be entitled to relief based on ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient in that it fell below prevailing professional norms and that this deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing on either part of the *Strickland* test, the claim fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). "A defendant establishes prejudice if []he can show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d 63, 69 (2006), *quoting Strickland*, 466 U.S. at 694.

¶10 The trial court determined Hunt's counsel's performance did not fall below prevailing professional norms and, in any event, that Hunt had failed to establish prejudice.

As we have explained, the court did not err in finding as aggravating factors that Hunt had fired multiple gunshots at different times during the pursuit and had sought to "set up" the pursuing officer by positioning his car to confront the officer. Hunt's counsel would have had no valid basis to object to the court's considering those factors, and therefore he cannot have been ineffective for failing to do so. Additionally, because the court explained it would have imposed the same sentence irrespective of its finding that bystanders had been endangered, Hunt is unable to demonstrate prejudice even assuming his counsel should have objected to that finding. Consequently, the court did not err in summarily rejecting Hunt's claim of ineffective assistance of counsel.

¶11 Although we grant Hunt's petition for review, for the reasons stated above, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge